Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-760–04 OF 2016, B-02(IM)–761–04 OF 2016, B-02(IM)-762–04 OF 2016 AND B-02(IM)-763–04 OF 2016
ABANG ISKANDAR, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
17 FEBRUARY 2017

Civil Procedure — Striking out — Appeal against order allowing striking out — Action taken against appellant for breach of fiduciary duties — Appellant brought action against third parties seeking contribution in the event appellant found liable — Third parties filed application to strike out appellant's statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 — Whether issues raised could be summarily determined without full trial — Rules of Court 2012 O 18 r 19(1)(a), (b), (c) & (d)

Tort — Joint tortfeasors — Right of contribution — Action taken against appellant for breach of fiduciary duties — Appellant brought action against third parties seeking contribution in the event appellant found liable — Third parties filed application to strike out appellant's statement of claim — Whether third parties tortfeasors

The Port Kelang Authority ('PKA') brought an action against the appellant premised on a series of allegations of breach of fiduciary duties in the appellant's capacity as general manager and Board member of PKA pertaining to the Port Kelang Free Zone Project ('the PKFZ project'). The appellants contended that the said breaches were made as a result of the collective deliberation, discussion and/or decision making process undertaken by the Board members of PKA, all of which were approved by the relevant ministries of the Government of Malaysia. Subsequently, the appellant filed third-party proceedings against the third parties seeking contribution in the event the appellant was found liable for any loss and damage suffered by PKA. The third parties in turn filed applications to strike out the appellant's statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The application was allowed and the learned judicial commissioner ('the JC') held, inter alia, that: (a) the appellant's third party claim ought to be related to the PKA's pleaded claim; (b) the appellant's liability to PKA, if proven, was of a personal nature; and (c) a claim for contribution by the appellant could not stand against the third parties as no duty was found between the parties. Aggrieved by the decisions of the JC, the appellant filed the present appeal. The grounds of appeal as submitted by the appellant were that the learned JC had erred in law

and/or fact: (a) in not finding that there were no triable issues, especially the involvement of the third parties in the collective decision in the meetings of the Board of PKA which was merely determined on affidavits evidence, whereas it should be effectively determined through a viva voce evidence at the trial; (b) in finding that the third parties as the Board members of PKA could not be liable as joint tortfeasors as there was no such provision in the Port Authorities Act 1963 ('the Act'); and (c) for failure to find the third parties as joint tortfeasors were collectively liable for the claim of contribution, in the event that the PKA's claim against the appellant was proven.

Held, allowing the appeals and setting aside the order of the High Court with costs:

(1) The issues in the present case could only be determined by way of an oral or viva voce evidence at trial of the matter because: (a) it was insufficient to consider the third parties' extent of involvement and/or participation in the decision making process solely on the board meeting minutes produced before the High Court; (b) the distinction between the executorial or non-executorial roles of the appellant and the third parties could only be drawn at the close of the trial and not summarily by way of affidavit evidence; and (c) the entitlement on the reliance on statutory protection under s 3 of the Act could only be triggered once a determination was made on whether the acts taken by the third parties were done for a bona fide purpose, as such, the reliance by the third parties on this provision at this stage was premature (see para 23).

(2) The learned JC erred in holding that the appellant's third party claim must be related to and/or have a nexus to the PKA's pleaded claim. The learned JC had also erred in holding that the appellant's liability to PKA, if proven, was of a personal nature. This was because the Ministry of Finance and Ministry of Transport represented by the third parties were the ultimate approving authorities of PKA. Further, the learned JC erred in making the determination that a claim for contribution by the appellant could not stand against the third parties as no duty was found to exist between the parties. A claim for contribution did not require there to be a relationship or duty to exist. The appellant was only required to show that the third parties were joint tortfeasor and had participated in the procurement of a tort causing loss and damage to PKA (see paras 30, 33 & 38–39).

(3) The issue of whether or not the third parties had actively participated in the Board meetings of PKA was not an issue which could be summarily determined in order to make finding whether or not the third parties were 'joint tortfeasors'. The true extent of the third parties' involvement

during the Board meetings of PKA could only be properly determined through a full trial of the action, wherein their testimony be subjected to curial scrutiny (see para 45).

[Bahasa Malaysia summary

Pihak berkuasa Pelabuhan Kelang ('PKA') membawa tindakan terhadap perayu berdasarkan siri tuduhan kemungkiran duti fidusiari di dalam kapasiti perayu sebagai pengurus besar dan ahli Lembaga PKA berkaitan Projek Zon Bebas Pelabuhan Kelang ('projek PKFZ'). Perayu-perayu berhujah bahawa kemungkiran tersebut dibuat akibat perbincangan kolektif, perbincangan dan/atau proses pembuatan keputusan yang dibuat oleh ahli Lembaga PKA, yang mana kesemuanya diluluskan oleh Kementerian Kerajaan Malaysia yang relevan. Kemudiannya, perayu memfailkan prosiding pihak ketiga terhadap pihak ketiga dengan memohon sumbangan jika perayu didapati bertanggungjawab untuk apa-apa kerugian dan ganti rugi yang dialami oleh PKA. Pihak ketiga sebaliknya memfailkan permohonan-permohonan untuk membatalkan pernyataan tuntutan perayu berikutan A 18 k 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012. Permohonan dibenarkan dan pesuruhjaya kehakiman yang bijaksana ('PK') memutuskan, antara lain, bahawa: (a) tuntutan pihak ketiga perayu patut berkaitan tuntutan yang diplidkan oleh PKA; (b) liabiliti perayu kepada PKA, jika dibuktikan, bersifat peribadi; dan (c) tuntutan untuk sumbangan oleh perayu tidak boleh dipertahankan terhadap pihak ketiga kerana tiada duti didapati di antara pihak-pihak. Tidak puas hati dengan keputusan PK, perayu memfailkan rayuan ini. Alasan-alasan rayuan seperti yang dihujahkan oleh perayu adalah bahawa PK yang bijaksana telah tersilap dari segi undang-undang dan/atau fakta: (a) dalam tidak mendapati bahawa tidak terdapat isu yang boleh dibicarakan. Terutamanya penglibatan pihak ketiga dalam keputusan kolektif dalam mesyuarat Lembaga PKA yang mana hanya menentukan atas keterangan afidavit-afidavit, sepatutnya ia ditentukan secara efektif melalui keterangan *viva voce* semasa perbicaraan; (b) dalam mendapati bahawa pihak ketiga sebagai ahli Lembaga PKA tidak boleh bertanggungjawab sebagai pelaku tort kerana tidak terdapat peruntukan sedemikian di dalam Akta Lembaga-Lembaga Pelabuhan 1963 ('Akta'); dan (c) kerana gagal untuk mendapati pihak ketiga sebagai pelaku tort bersama adalah bertanggungjawab secara kolektif bagi tuntutan sumbangan, sekiranya tuntutan PKA terhadap perayu dibuktikan.

Diputuskan, membenarkan rayuan-rayuan dan mengenepikan perintah Mahkamah Tinggi dengan kos:

(1) Isu-isu dalam kes ini hanya boleh ditentukan melalui keterangan lisan atau *viva voce* pada perbicaraan perkara tersebut kerana: (a) ia adalah tidak mencukupi untuk mempertimbangkan setakat mana penglibatan dan/atau pengambilan bahagian pihak ketiga dalam proses pembuatan

keputusan hanya ke atas minit-minit Mesyuarat Lembaga yang dikemukakan di hadapan Mahkamah Tinggi; (b) perbezaan di antara peranan wasi dan bukan wasi perayu dan pihak ketiga hanya boleh dibuat di akhir perbicaraan dan bukan secara ringkas melalui keterangan afidavit; dan (c) hak atas pergantungan terhadap perlindungan statutori di bawah s 3 Akta hanya boleh dicetuskan sebaik saja penentuan dibuat atas sama ada tindakan yang diambil oleh pihak ketiga dibuat untuk tujuan bona fide, seperti, pergantungan oleh pihak ketiga atas peruntukan ini di peringkat ini adalah pramatang (lihat perenggan 23).

(2) PK yang bijaksana tersilap dalam memutuskan bahawa tuntutan pihak ketiga mesti dikaitkan kepada dan/atau mempunyai hubungan kepada tuntutan yang diplidkan oleh PKA. PK yang bijaksana juga tersilap dalam memutuskan bahawa liabiliti perayu kepada PKA, jika dibuktikan, adalah bersifat peribadi. Ini adalah kerana Kementerian Kewangan dan Kementerian Pengangkutan yang diwakili oleh pihak ketiga adalah pihak berkuasa utama yang meluluskan bagi PKA. Selanjutnya, PK yang bijaksana tersilap dalam membuat penentuan bahawa tuntutan untuk sumbangan oleh perayu tidak boleh dipertahankan terhadap pihak ketiga kerana tiada duti didapati wujud di antara pihak-pihak. Tuntutan untuk sumbangan tidak memerlukan terdapat hubungan atau duti wujud. Perayu hanya dikehendaki untuk menunjukkan bahawa pihak ketiga adalah pelaku tort bersama dan telah mengambil bahagian dalam pemerolehan tort yang menyebabkan kerugian dan ganti rugi kepada PKA (lihat perenggan 30, 33 & 38–39).

(3) Isu sama ada atau tidak pihak ketiga telah secara aktif mengambil bahagian di dalam mesyurat Lembaga PKA bukanlah menjadi isu yang boleh ditentukan secara ringkas untuk membuat dapatan sama ada atau tidak pihak ketiga adalah 'joint tortfeasors'. Setakat mana penglibatan pihak ketiga sebenarnya semasa mesyuarat Lembaga PKA hanya dapat ditentukan dengan betul melalui perbicaraan penuh tindakan, di mana keterangan mereka disubjekkan kepada penelitian kurial (lihat perenggan 45).]

Notes

For a case on appeal against order allowing striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9278.

For cases on right of contribution, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 987–988.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347, FC (refd)

Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor [2012] 5 MLJ 176, CA (refd)
Dingle v Associated Newspapers Ltd and others [1961] 2 QB 162, CA (refd)
Lawrance v Norreys (1890) 15 App Cas 210, HL (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389, FC (refd)
Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (refd)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (refd)
Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties) [2012] 9 MLJ 464, HC (refd)
Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ 473, CA (refd)
Wenlock v Moloney [1965] 2 All ER 871, CA (refd)

Legislation referred to

Civil Law Act 1956 s 10(1)(c)
Port Authorities Act 1963 ss 2, 3, 3A(1), 13(1), (14)
Rules of Court 2012 O 18 r 19(1), (1)(a), (1)(b), (1)(c), (1)(d)

Appeal from: Suit No AT2–22–1500 of 2009 (High Court, Shah Alam)

Mathew Thomas Philips (Lavinia Kumaraendran and Mavinthra Jothy with him) (Thomas Philip & Co) for the appellant.
P Jeyakumar (Nur Hidayah Saidi with him) (Zahir Jeya & Zainal & Co) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] This is the appellant's four consolidated appeals against the order of the High Court, Shah Alam on 17 March 2016 allowing the third parties' application to strike out the appellant's statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The four consolidated appeals before this court are as follows:

(a) Civil Appeal No B-02(1M)-760–04 of 2016;

(b) Civil Appeal No B-02(1M)-761–04 of 2016;

(c) Civil Appeal No B-02(1M)-762–04 of 2016; and

(d) Civil Appeal No B-02(1M)-763–04 of 2016.

('the consolidated appeals')

[2] For ease of reference, the respondents in the consolidated appeals will be collectively referred to herein as ('the third parties').

MATERIAL FACTS

[3] The material facts pertaining to the consolidated appeals are set out below.

[4] The main action in the High Court was commenced by Port Kelang Authority ('PKA') against the appellant. The action was premised on a series of allegations of breach of fiduciary duties in the appellant's capacity as General Manager and Board member of PKA pertaining to the Port Kelang Free Zone Project ('PKFZ project').

[5] In her defence, the appellant pleaded that the breaches complained by PKA were made as a result of the collective deliberation, discussion and/or decision making process undertaken by the Board members of PKA, all of which were approved by the relevant ministries of the Government of Malaysia.

[6] In this regard, the Ministry of Transport ('MOT') and the Ministry of Finance ('MOF') were the approving authorities of any decisions and/or acts of PKA.

[7] The appellant had on 5 May 2011 initiated third party proceedings against 26 other third parties in the High Court to seek contribution in the event she is found liable for any loss and damage suffered by PKA.

[8] The appellant's statement of claim particularises the appellant's allegation of the third parties' involvement in respect of the PKFZ project: see pp 312–360 of *rekod rayuan Bahagian* A *Jld* 1(2). Briefly, the appellant's allegations are, amongst others, as follows:

(a) the third parties, as board members of PKA collectively owed a duty of care (both fiduciary and at common law) to PKA;

(b) pursuant to Circular No 3 of 1998, which has been adopted by PKA during a board meeting on 7 December 2000, the third parties as board members are collectively responsible for all the decisions and activities undertaken by the Board of PKA; and

(c) the third parties were all jointly involved and/or participated in the discussions, deliberations and/or decisions which were made during the

board meetings of PKA. At all material times, the third parties had knowledge of all decisions made and/or to be made by the board with regards to the PKFZ project.

[9] Further to the third party claim taken out by the appellant, the third parties had vide four separate applications, applied to the Shah Alam High Court to strike out the appellant's third party notice and all references thereto via:

(a) the first third party's notice of application dated 6 July 2015 ('encl 83');

(b) the fourth, 11th, 13th, 14th, 16th, 18th, 19th, 20th, 22nd, 23rd, 24th and 26th third parties' notice of application dated 3 September 2015 ('encl 90');

(c) the second, eighth, ninth, 12th, 15th, 17th and 21st third parties' notice of application dated 30 September 2015 ('encl 92'); and

(d) the third, fifth and sixth third parties' notice of application dated 24 November 2015 ('encl 99').

('the striking out applications')

[10] On 17 March 2016, the Shah Alam High Court allowed the striking out applications with costs of RM40,000 to be awarded to the first third party and the costs of RM50,000 to be awarded to the remaining third parties.

THE FINDINGS OF THE HIGH COURT

[11] In allowing the third parties' striking out application, the learned judicial commissioner ('JC') observed and made the following findings of fact and/or law, amongst others:

(a) the claim brought by the plaintiff (PKA) against the appellant was in her capacity as the general manager ('GM') and a board member of PKA;

(b) the third party notices ('TPN') issued by the appellant for contribution against the third parties must be related to the PKA's pleaded claim and cause of action against the appellant;

(c) a third party claim cannot exist independently and be a separate claim unrelated or without any nexus to the pleaded claim;

(d) there was no relationship shown to exist between the appellant and the third parties that can give rise to the appellant's right to claim contribution from the third parties; and

(e) the third parties as members of the PKA Board are conferred statutory protection under s 3A(1) of the Port Authorities Act 1963.

THE APPEAL

[12] Dissatisfied with the decision of the learned JC, the appellant filed an appeal to this court. Hence the present four consolidated appeals. The grounds of appeal advanced by the appellant in accordance with the memorandum of appeal are as follows:

(a) learned JC had erred in law and/or fact in allowing the third parties's application to struck out the appellant's statement of claim against them (encl 90);

(b) learned JC had erred in law and/or fact in failing to find the appellant's statement of claim against the third parties did not raise any triable issues, amongst others as follows:

(i) whether the third parties as the members of the Board of PKA who were present during the board meetings involving the decision making process relating to PKFZ project;

(ii) whether the third parties as the members of the Board of PKA were responsible of the collective decision making process pertaining to PKFZ project or some other reasons that the action should proceed to trial;

(c) learned JC had erred in law and/or fact in not finding that there were triable issues, especially the involvement of the third parties in the collective decision in the meetings of the Board of PKA which was merely determined on affidavits' evidence, whereas it should be effectively determined through a viva voce evidence at the trial of the action;

(d) learned JC had erred in law and/or fact in finding that the third parties as the board members of PKA could not be liable as joint tortfeasors as there is no such provision in the Port Authorities Act 1963;

(e) learned JC had erred in law and/or fact for failure to find the third parties as joint tortfeasors were collectively liable for the claim of contribution, in the event that the PKA's claim against the appellant was proven; and

(f) learned JC had erred in law and/or fact in finding that the appellant had failed to show that she had a reasonable claim against the third parties or some other reasons that the action should be tried.

THE THIRD PARTIES' SUBMISSION

[13] Before us, learned counsel for the first third party vide Civil Appeal No B-02(1M)-760–04 of 2016 canvassed, inter alia, as follows:

(a) the plaintiff's ('PKA') claim against the appellant is for acts and/or omissions of the appellant in her capacity as the general manager of the PKA and not for any acts and/or decisions and/or omissions carried out with members of the PKA;

(b) the PKA in its amended statement of claim averred that as the general manager of the PKA, she owed various fiduciary duty, contractual and common law duties to the PKA;

(c) PKA's claim is premised on the appellant's executive role and function as general manager while it is undeniable that the first third party was a member of the Board of PKA without any executive function or duty;

(d) the appellant's TPN sought from the third parties contribution for being a board member of the PKA;

(e) it is trite that in a third party application for contribution, the appellant has to satisfy that there is a question fit to be tried as to liability of the third parties to make contribution on the claims by the PKA against the appellant. The claims by the PKA against the appellant are in relation to the personal breaches by her in her capacity as the general manager of the PKA and not for actions or decisions of the board;

(f) there can be no relationship between the appellant and the third parties that give rise to any joint collective responsibility to the PKA;

(g) the averments in paras 84–87 of the appellant's statement of claim against the third parties cannot be equated with them being averments of the appellant's wrongs or of the third parties being a joint tortfeasor in the wrongs alleged against her by the PKA;

(h) generally the third parties were involved and participated in some decisions making process. This however falls short of what is required to make the third party a joint tortfeasor with the appellant. It is trite that there ought to be more than passive presence and participation in the decision making process. In addition, there must also exist, the element of active and purposeful procurement of the tort: see *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464;

(i) there is no such legal relationship giving rise to such a notion as suggested by the appellant and the claim against the third party is totally flawed and without basis: see *Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176;

(j) s 13(1) and (14) of the Port Authorities Act 1963 are self-explanatory in that only the appellant as general manager is an officer of the PKA and has executive duties;

(k) the appellant is not entitled to claim contribution from a member such as the third party who is a statutory appointee protected by law and one who is not a joint tortfeasor with the appellant; and

(l) s 3A(1) of the Port Authorities Act 1963 specifically provides statutory protection from personal liability to any member of the authority. As a statutory appointee, the third party has statutory protection from personal liability and cannot be subjected to any claims, action, liability or demand under s 3A(1) of the Port Authorities Act 1963.

[14] Briefly, learned counsels for the third parties vide Civil Appeal No B-02(1M)-761–04 of 2016, Civil Appeal No B-02(1M)-762–04 of 2016 and Civil Appeal No B-02(1M)-763–04 of 2016 advanced the submission as follows:

(a) the statement of claim by PKA against the appellant is for breach of her duties as the general manager of PKA;

(b) the third parties are statutory appointees by virtue of s 2 of the Port Authorities Act 1963 and only get an allowance for being members of the Board of PKA. None of the third parties hold any executive post in PKA. None of the third parties are paid any salary by PKA;

(c) the appellant, as general manager, is the top executive of PKA and heads the administration of PKA. The appellant has a contract of service with PKA and is a salaried employee of PKA;

(d) the third parties did not take part in any of the breaches as alleged or complained of by PKA;

(e) the third parties are not joint tortfeasors with the appellant and hence the appellant cannot seek contribution from the third parties via third party proceedings;

(f) none of the allegations of breaches as stated in the statement of claim touches upon or implicates the third parties. Therefore there are no issues to be tried with respect to the claim made by the appellant against the third parties;

(g) the affidavits, the Port Authorities Act 1963 and the law is sufficient for the court to determine the matter by way of interlocutory proceedings;

(h) as such the claim by the appellant:

(i) discloses no reasonable cause of action against the third parties;

(ii) is scandalous, frivolous and vexatious;

(iii) would prejudice, embarrass and delay the trial of the action; and

(iv) is an abuse of the process of the court.

[15] Learned counsel for the first third party submitted that it is trite that the court may at any stage of the proceedings order to be struck out any action on the ground that it discloses no reasonable cause of action. It is scandalous, frivolous or vexatious, it may prejudice or otherwise an abuse of the process of the court: see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7.

[16] The High Court had closely scrutinised all the issues raised and His Lordship was correct in allowing the third parties striking out applications against the appellant's claim which was obviously unsustainable.

OUR DECISION

[17] We propose to deal with the issues of law and fact raised by the appellant and the third parties under the below-mentioned headings.

The law on striking out

[18] Order 18 r 19(1) of the Rules of Court 2012 sets out in no uncertain terms the four limbs that allow for the striking out of a claim and/or pleading.

[19] It is settled law that only in *plain and obvious cases* recourse should be had to the summary process under O 18 r 19(1) of the ROC 2012. A claim can only be struck out where it appears on the fact of it to be *obviously unsustainable*: see *Bandar Builder Sdn Bhd & Ors*.

[20] It is trite that even if a single triable issue is raised and shown to be existed, the action should proceed to trial. The action should not be summarily disposed. Also the mere fact that the case is weak and not likely to succeed at the proper trial is no ground for the pleadings to be struck out: see *Wenlock v Moloney* [1965] 2 All ER 871 (CA).

[21] In dealing with striking out application under O 18 r 19(1), this court in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235, reminded judges that 'the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution' — per Seah FJ. It is a power which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrance v Norreys*

(1890) 15 App Cas 210 — as cited in *CC Ng & Brothers*).

[22] The case in which a striking out claim was set aside on appeal, is exemplified in the case of *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473 where this court made the following observation:

> There are *issues of law that need to be elaborated and argued in great detail and for mature consideration. There are also issues of fact for the trial court to scrutinise and determine* how and what manner the orders and instructions were made by the first respondent; under what circumstances and in what manner the arrests were affected by the individual arresting officers on all the appellants. It would be also for the trial court to scrutinise the evidence to determine whether the first respondent had 'cause to arrest, and if the cause was 'reasonable'. These are factual issues relevant to determine whether the arrests were wrongful or not. *Clearly, these issues cannot be summarily disposed of by way of affidavits in a striking out application*. This is not an appropriate case to be summarily struck out under O 18 r 19 of the RHC.

[23] In view of the foregoing authority, we are of the view that the above mentioned issues can only be determined by way of an oral or viva voce evidence at trial of the matter. This is for the reasons, inter alia:

(a) it is insufficient to consider the third parties' extent of involvement and/or participation in the decision making process surrounding the PKFZ project solely on the Board Meeting minutes produced before the High Court;

(b) the distinction if any to be drawn between the executorial or non-executorial roles of the appellant and the third parties can only be drawn at the close of trial and not summarily by way of affidavit evidence. This is of paramount importance given that the Port Authorities Act 1963 is silent on the same; and

(c) the entitlement on the reliance on statutory protection under s 3 of the Port Authorities Act 1963 can only be triggered once a determination is made on whether the acts taken by the third parties were done for a *bona fide purpose* the third parties' reliance on this provision at this stage is therefore premature.

Third party claim for contribution

[24] In our jurisdiction, the law on a third party claim for contribution is set out in s 10(1)(c) of the Civil Law Act 1956. It is reproduced below:

> any tortfeasor liable in respect of that *damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so*, however, that no person shall be entitled to recover contribution under this section from any person entitled to be

indemnified by him in respect of the liability in respect of which the contribution is sought.

[25] The courts have interpreted the issuance of TPN as arising from situations where if the court can see from the transaction brought before it that the rights of one of the parties will or may be so affected, the court shall have power to bring all the parties before it, and determine the rights of all in one proceeding.

Third party proceedings are independent from the plaintiff's (PKA) claim against the appellant

[26] It was the express finding of the High Court that a third party claim cannot exist independently and be a separate claim unrelated or without any nexus to the plaintiff's pleaded claim against the appellant.

[27] In the Supreme Court decision in *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226, it was held, inter alia, as follows:

> Third-party proceedings for contribution *should be regarded as independent of and separate from proceedings by a plaintiff against a defendant*. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party.

[28] In the factual matrix of this case, the appellant's claim against the third parties is that the said third parties were all jointly involved and/or had participated in the discussions, deliberations and/or decisions which were made during the board meetings of PKA. In this regard:

(a) at all material times, the third parties had knowledge of all decisions made and/or to be made by the Board of PKA with regards to the PKFZ project; and

(b) accordingly, the third parties, as board members of PKA collectively owed a duty of care (both fiduciary and at common law) to PKA. This is undisputed.

[29] In the circumstances, if PKA's claim against the appellant were to succeed, the third parties may be held contributorily liable pursuant to their involvement in the PKFZ project. It is further submitted by the appellant that there is no necessity for the PKA's claim against the appellant to be related and/or connected to the issue of whether the collective involvement of the third parties during the board meetings of PKA had contributed to the loss and damage suffered by PKA.

[30] Taking cognisance of the above, the learned JC had fallen into error in his interpretation of the law in holding that the appellant's third party claim must be related to and/or have a nexus to the PKA's pleaded claim.

The High Court's failure to consider Circular No 3 of 1998

[31] At all material times reliance was placed by the appellant on Circular No 3 or 1998 dated 21 July 1998 which was adopted by the PKA vide its board meeting dated 7 December 2000.

> 1. In essence, paragraph 5.4.1 of Circular No. 3 of 1998 expressly sets out that the Board Members of PKA ie the third parties are *jointly responsible for all decisions made by PKA*, whether or not they were present during the PKA Board meetings.

[32] A perusal of the High Court grounds of judgment will show that the learned JC had failed to consider and/or had merely glossed over the effect of Circular No 3 of 1998. Instead the learned JC proffered the view that the plaintiff's claim was in relation to personal breaches committed by the appellant in her capacity as GM of PKA which does not involve the third parties.

[33] The High Court was erroneous in fact and/or in law in holding that the appellant's liability to PKA, if proven, was of a personal nature. This is because:

(a) at all material times, the appellant had maintained that the third parties were integral to the decision making process surrounding the PKFZ project;

(b) specifically, the third parties who were representatives of the Ministry of Finance ('MOF') and Ministry of Transport ('MOT') at the material time played a crucial factor in expressing their views and/or input;

(c) to that end, it is undisputed that the MOF and MOT were the ultimate approving authorities of PKA; and

(d) accordingly, it would be a fallacy for liability to be placed in the personal capacity of the appellant when the thrust of the decision making process was helmed by the relevant government ministries, to which PKA is subjected to.

[34] The involvement of the third parties specifically the representatives of the MOF and MOT rests squarely within the confines of the appellant's pleaded claim against the third parties in so far as para 5.4.1 of Circular No 3 of 1998 is concerned.

[35] It is settled law that where a trial judge has not directed his mind to the relevant issues at hand, appellate intervention is warranted to remedy the

fundamental misdirection of fact and/or law. Accordingly, the learned JC's failure to consider the effect of Circular No 3 of 1998 towards the appellant's claim for contribution against the third parties ought to be remedied by this court.

There is no necessity for the third parties to owe a duty of care to the appellant

[36] It is undisputed here in that the appellant's claim against the third parties is a claim for contribution (and not for an indemnity) in the event the appellant is found liable to PKA. In the case of *Sime Darby Bhd & Ors*, the High Court made the following observation:

> I agree with learned counsel for the third parties that *none of the relationships recognised either in law or in equity that can give rise to a right to an indemnity, or an obligation to indemnify*, exists or existed between the third parties or any of them, and the first and second defendants.

[37] A distinction must be drawn between a claim for an indemnity and a claim for a contribution. The *Sime Darby Bhd & Ors*'s case, has clearly shown that:

(a) a legal relationship need only be established in a claim for indemnity from a defendant towards a third party;

(b) there is no necessity for there to be a relationship (whether in law or equity) to arise between the appellant and the third parties before a claim of contribution can be maintained; and

(c) in so far as a claim for contribution is concerned, all that needs to be shown is this:

> Under the Malaysian position *the first and second defendants would only be entitled to a contribution if the third parties or any of them are in law, joint tortfeasors with the first and second defendants*.

[38] The learned JC had therefore erred in making the determination that a claim for contribution by the appellant could not stand against the third parties as no duty was found to exist between the parties. His Lordship had relied on, amongst others, the authority of *Multi-Code Electronics Industries & Anor*. To that end, it was contended by the appellant as follows:

(a) it is patently clear in the *Sime Darby Bhd & Ors*, that the authority of *Multi-Code Electronics Industries and Anor*, was referred to therein in determining whether a claim for indemnity (and not contribution) could be sustained;

(b) an analogy was drawn in the *Multi-Code Electronics Industries & Anor,* supra that no duty existed between co-directors of a company such that a

A claim for an indemnity between directors could be sustained;

(c) it is undisputed herein that the appellant's claim against the third parties is confined to that of a contribution in the event the appellant is found liable to PKA; and

B (d) accordingly, the High Court's reliance and/or interpretation of a need for a duty to exist between the appellant and the third parties is misconceived.

C **[39]** In summary, a claim for contribution does not require there to be a relationship/duty to exist. The appellant is only required to show that the third parties were *joint tortfeasor* and had participated in the procurement of a tort causing loss and damage to PKA (if proven).

D *The third parties are 'joint tortfeasors'*

[40] The term 'joint tortfeasor' has been defined to mean two or more persons who commit a wrong or tort jointly. Further, it is expressed as one of two or more persons *acting in concert in commission of a tort*. The said term has E been judicially considered in the English authority of *Dingle v Associated Newspapers Ltd and others* [1961] 2 QB 162 which was in turn cited with approval by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389:

F > ... *where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole* of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those other have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he G can obtain judgment for total compensation from anyone whose act has been a cause of his injury.

[41] In the present appeal, the appellant asserted that the respondent is a H joint tortfeasor (in the event PKA's claim succeeds) in the breaches alleged by PKA. To that end, all that needs to be demonstrated is proof of joint participation between the appellant and the third parties.

[42] The basis for saying that the third parties are joint tortfeasors are as I follows:

(a) the PKA Board meeting minutes which have been produced before this court clearly indicate that there was involvement on the part of the third parties, in so far as discussions and/or decisions pertaining to the PKFZ project were concerned; and

(b) we noted that even the High Court had made a finding that the third parties were involved and had participated in some decision making process involving the PKFZ project.

[43] As can be seen, the third parties were in a position to influence the deliberations, discussions and/or decisions which were made during the board meetings of PKA. In this regard:

(a) any disclosure of information (or lack thereof) by the relevant MOF and MOT representatives would affect the deliberations, discussions and/or decisions made during the board meetings of PKA; and

(b) the attendance at the board meetings of various third parties throughout the appellant's tenure as board member of PKA will show that the third parties had indeed played an active and purposeful role in the decision making process pertaining to the PKFZ project.

[44] The above is consistent with the appellant's pleaded case that the third parties had jointly participated and/or were responsible for the alleged impugned decisions taken on behalf of PKA. Therefore, it cannot be viewed that the third parties' presence albeit a 'passive presence' in the decision making process surrounding the PKFZ project.

[45] Notwithstanding, the issue of whether or not the third parties had actively participated in the board meetings of PKA is not an issue which can be summarily determined in order to make a finding whether or not the third parties were 'joint tortfeasors.' The true extent of the third parties' involvement during the board meetings of PKA can only be properly determined through a full trial of the action, wherein their testimony be subjected to curial scrutiny.

CONCLUSION

[46] In the circumstances, in view of the complexities and intricate facts involved in the issues raised herein, we agree with the appellant that the claim against the third parties be allowed to proceed and ventilate in a full trial. As such we, therefore, unanimously allowed the four consolidated appeals with costs of RM30,000 in respect of Appeal 760 here and below and RM20,000 in respect of Appeals 761, 762 and 763 here and below. We set aside the order of the High Court. The cost is subjected to allocator. Deposit is refunded.

Appeals allowed; order of High Court set aside with costs.

Reported by Dzulqarnain Ab Fatar